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NOTES OF INDIAN CASES.

BANKU BEHARI CHATTERJI *v.* NARAINDAS DUTT, (1927) I L R 54 Cal. 500 : 52 M L J 565 (P C).

This decision of the Judicial Committee of the Privy Council is of more than passing interest in the law of limitation and procedure relating to the execution of decrees. The facts of the case are more fully set out in the report of the decision of the High Court in *Narain Dass Dutt* v. *B. B. Chattopadhya* (1). The mortgagor had effected four successive mortgages on his properties and the first mortgagee brought a suit in the High Court of Calcutta on his mortgage impleading the subsequent mortgagees as parties. A composite decree was passed giving each one of the mortgagees right to execute the decree and bring the properties comprised in their respective mortgages to sale; the same decree, apparently, also provided for the personal remedy of the several mortgagees against the other properties of the mortgagor. At the instance of the first three mortgagees, the properties comprised in the mortgages were sold. After 12 years of the decree but less than 3 years after the mortgaged properties were sold at the instance of the other mortgagees, the fourth mortgagee who had taken no steps in the interval applied to execute the personal portion of his decree by attaching and selling the other properties of the mortgagor and the question was whether such an execution application was in time with reference to Art. 183 of the Limitation Act. Their Lordships have answered it in the negative upholding the decision of the High Court. It may perhaps be noticed that the mortgage decree in the case was one passed under the Transfer of Property Act and not under the Civil Procedure Code of 1908.

1. (1924) 78 I C 1001.

The observations of their Lordships on the question of limitation applicable to mortgage decrees have therefore to be understood with reference to the facts abovementioned as they are liable to be misunderstood, if divorced from their context. For instance, we do not understand that their Lordships have said anything to shake the authority of the cases which have held that in cases where a mortgage decree is passed in strict conformity with the forms in the Code, the decree-holder has 12 years under S. 48 of the Civil Procedure Code and Art. 182 of the Limitation Act to execute the final decree for sale in a mortgage suit, *Somar Singh* v. *Deonandan* (2), and that after all the mortgaged properties are sold, he has still three years under Art. 181 of the Limitation Act from the date when the sale becomes absolute for applying for a supplemental personal decree under O. 34, R. 6. *Rama Venkatasubba Aiyar* v. *Shanmukam Pillai* (3), *Raj Narain Mal* v. *Santi Lal* (4), *Pell* v. *Gregory* (5) and he will have another 12 years to execute the personal decree under S. 48 of the Civil Procedure Code or Art. 183 of the Limitation Act. In the case under notice the decree was a composite one against the mortgaged properties and the person or the other properties of the mortgagor and was therefore not affected by the decisions referred to above. Such a composite decree is not illegal and reference may be made in this connection to *Jeuna Bahu* v. *Parmeshwar Narayan Mahtha* (6), *Darbari Mal* v. *Mula Singh* (7) and *Pell* v. *Gregory* (5). In the case of such a decree by the High Court, it is not clear from what date time would run for the execution of the personal portion of the decree. Cf. *Khulna Loan Company* v. *Jnanendra Nath Bose* (8), *Aiyasamier* v. *Venkatachela Mudali* (9), *Nawab Shujaulmulk Bahadur* v. *Umirul-umra Bahadur* (10).

Coming to the second question, their Lordships have held that when a decree is transferred for execution to another court, the transferring court only performs a ministerial act in transferring the decree and the question whether execution of the decree is barred by limitation or not is a matter falling to be decided by the court

2. (1927) 8 Pat. L T 379. 3. (1913) M W N 867.
4. (1922) 21 A L J 37. 5. (1925) I L R 52 C 828 (F B).
6. (1918) L R 46 I A 294 : 36 M L J 215 (P C).
7. (1920) I L R 42 A 519. 8. (1917) 22 C W N 145.
9. (1916) I L R 40 M 989 : 31 M L J 513 (F.B).
10. (1925) I L R 48 M 846 : 49 M L J 498.

to which the decree is transferred for execution. It is immaterial in this connection whether notice was issued to the judgment-debtor of the application for transfer by the original court under the rules of the court or otherwise. Cf. *Chutterput Singh* v. *Sait Sumari Mull* (11) and *Narain Das Dutt* v. *B. B. Chattopadhya* (1). This view of their Lordships gives full effect to the provisions of the Code under which it is the decree that is transferred to another court for execution and it is a matter for the executing court which is the latter court, to decide whether execution of the decree is barred or not. In giving effect to this view their Lordships have approved of the Full Bench decision of the Calcutta High Court in *Chutterput Singh* v. *Sait Sumari Mull* (11) which has not been followed by the Madras High Court in *Rajitagiripathi* v. *Bhawani Sankaram* (12). After this pronouncement of the Privy Council, this decision of the Madras High Court and the decision in *Muthuveeraswami Nayudu* v. *Annamalai Chettiar* (13) in so far as it relates to the power of the original court to decide such a question would seem to require reconsideration. The question however whether the court which passed the decree should decide as to who is the proper legal representative of the judgment-debtor may stand on a different footing by reason of the express provision in S. 50 of the Civil Procedure Code, and the decision in *Muthuveeraswami Nayudu* v. *Annamalai Chettiar* (13) on this point may not be affected by the case under notice.

KHETRA MOHAN SAHA *v.* JAMINI KANTA DEWAN, (1927) I L R 54 Cal. 445.

In this case a document attested by witnesses which was clearly a promissory note did not say in terms that the amount of it was payable to the order of the payee but it was none the less so payable under Explanation 1 to S. 13 of the Negotiable Instruments Act by which in the absence of words of any prohibition, a promissory note payable to the payee was also payable to his order and the question was whether it was a bond within the terms of S. 2 (5) (*b*) of the Indian Stamp Act and the learned Judges have answered it in the affirmative. A similar view was taken by the Judicial Commissioner of

1. (1924) 78 I C 1001. 11. (1916) I L R 43 C 903 (F B).
12. (1924) I L R 47 M 641 : 47 M L J 4.
13. (1926) M W N 120.

Nagpur in *D. Rosario* v. *Hariballabh Onkarjee Trivedi* (1) but this case is of no authority as the difficulty has not been noticed with reference to the explanation referred to above. The point therefore is really one of first impression and we are not sure whether as much cannot be said for the opposite view as for the one which found acceptance by the learned Judges. It may at once be conceded that a promissory note does not cease to be one or become a bond merely because it is attested by witnesses. See *Reference under Stamp Act, S.* 46 (2). To fall within the definition of a bond in the Indian Stamp Act, the instrument needs a further requisite, *i. e.,* that it should not be payable to order or bearer. In the absence of anything in the language of S. 2 (5) (*b*) of the Indian Stamp Act restricting it to the apparent tenour of the instrument, there does not seem to be anything to so understand it and hold that though an instrument is payable to order under the law as under S. 13, Explanation (1) of the Negotiable Instruments Act, it is still one not payable to order under S. 2 (5) (*b*) of the Indian Stamp Act and is a bond within the definition of the latter Act. The decision of the learned Judges would have been quite clear if the Indian Stamp Act had excluded from its definition of a bond only those which contain the words "order or bearer" on their face. The decision of the learned Judges has perhaps this advantage, that instruments of this nature will be admissible on the payment of a penalty under S. 35 of the Stamp Act which will not be the case if they are treated only as promissory notes within the meaning of the Act. If a document falls both within the definition of a promissory note and a bond in the Indian Stamp Act, it will have to bear the higher stamp duty under S. 6 of the Act as a bond and the prohibition regarding its admissibility in evidence as a promissory note may thus be removed.

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1. (1927) 100 I C 794. 2. (1884) I L R 8 M 87 (F B).

DURGA CHARAN CHANDRA *v.* AMBIKA CHARAN CHANDRA, (1927) I L R 54 Cal. 424.

In this case, a puisne mortgagee with a view to avert a sale of the mortgaged properties in execution of a decree on a prior mortgage paid off the decree amount and sued to recover the amount personally from the mortgagor without bringing a suit on the prior mortgage and the question was therefore whether a puisne mortgagee's right under the circumstances was exclusively one under S. 74 of the Transfer of Property Act by being subrogated to the rights of the prior mortgagee whom he paid off or whether he has a cumulative right under S. 69 of the Indian Contract Act for the reimbursement of the amount. The learned Judges have answered the question in the latter alternative, though one of them has done so with some hesitancy. That the right conferred by S. 69 of the Indian Contract Act has not been excluded by S. 74 of the Transfer of Property Act has been the view of the Patna and the Allahabad High Courts in *Sibanand Misra* v. *Jagmohan Lall* (1) and *Shib Lal* v. *Munni Lal* (2). We venture to think that it is the latter case which is referred to in the report of the decision under review perhaps by a mistake of the reporter as *Sheo Saran Chandri* v. *Ram Lagan Das* (3). The Patna High Court in the case referred to above has differed from the Allahabad decision on the question of limitation for enforcing the mortgage right acquired by subrogation but has adopted the portion of the decision relating to the remedy under S. 69 of the Contract Act being cumulative. The decision has now the authority of at least three High Courts and there is none to the contrary, so far as we are aware.

In the course of his judgment, Mr. Justice Mukerji has observed that if the prior mortgage which is paid off does not contain a personal covenant, the provisions of S. 69 can not be invoked as in the learned Judge's view, the mortgagor will not in that case be bound to pay the amount within the meaning of the section. We are not sure that in observing that the section requires a pre-existing personal liability, the learned Judge had regard to the illustration to the section itself which is a case where only the property was liable as under a charge and there was no personal liability. Besides there are decisions in the Calcutta High Court itself to the effect that the section does not

1. (1922) 1 Pat. 780.
2. (1921) I L R 44 A 67.
3. (1921) I L R 44 A 64.

require a personal liability and that it is sufficient if it is with reference to property alone. Reference may be made in this connection to the case of *Mothooranath Chuttopadhya* v. *Kristokumar Ghose* (4) which has been followed in *Chandradaya* v. *Bhagaban* (5) and *Sarajubala* v. *Kamini Kumar* (6) the last being a case to which, we believe the learned Judge was himself a party.

In this connection, it must be observed that the rules of law in England and India as to the rights of a mortgagee who with a view to protect his interests makes some necessary payments, are not similar. In England, in such a case, the mortgagee would only be entitled to add the amounts to the mortgage money and cannot sue for the same as on a debt. See *Ex parte Fowings In re Sneyed* (7) and the other cases which have been referred to in Dr. Ghose on Mortgages, 4th edition, at pp. 558, 559. The law in this country has been held to be otherwise as pointed by Mukerji, J., in the present case. It is possible that it is the view of the law held in England that led Mr. Justice Graham to entertain the doubts he did on the main question.

DARBARI LAL *v.* MAHBUBALI MIAN, (1927) I L R 49 All. 640.

In this case we have a somewhat extended application of S. 140, Indian Contract Act. That section says that the surety is entitled to all the rights which the creditor has against the principal debtor upon payment or performance of all that he is liable for. Here no doubt the surety had not paid up the whole amount. But the whole amount was subsequently paid up by the principal debtor with the assistance of a third party who himself took no assignment of the security from the creditor. By the payment by the principal debtor the whole claim of the creditor is satisfied. Then why should not the surety be entitled to claim the right to the securities, along with the stranger it may be? The stranger's right is only an equitable right and why should it be pitched higher than that of the surety?

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4. (1878) I L R 4 C 369. 5. (1915) 23 C L J 125.
6. (1925) 43 C L J 142. 7. (1883) 25 Ch. D 338 at p. 352.

ULFAT BIBI *v.* BAFATI, (1927) I L R 49 All. 773.

Having regard to the decision of the Privy Council in *Besant* v. *Narayaniah* (1) that a suit does not lie for the custody of children and the remedy if any has to be sought for within the Guardian and Wards Act (*Sathi* v. *Ramandi Pandaram*) (2) Courts have been disposed to take a "merciful" view of S. 25 of the Act and apply the section even though the child was not at any time in the *actual* custody of the guardian (See *Ibrahim Nachi* v. *Ibrahim Sahib* (3). The definition of the word "guardian" in S. 4 of the Act makes it perfectly clear that the term is not confined to guardians appointed or declared by the Court but includes natural guardians. Especially the need for such inclusion can be re-inforced by reference to the fact that S. 19 prohibits the appointment of a guardian for the person of the minor when the father is not unfit to act as such for otherwise, the father cannot recover a child improperly taken out of his custody.

JAVITRI *v.* GENDAN SINGH, (1927) I L R 49 All. 779.

It is difficult to perceive the significance of the remark in the judgment at page 787, of the report that Mussamat Javitri left no daughters but only sons. Even if there were daughters they could not have taken the property—it being now established that property inherited is not stridhan. In this case, Javitri's right to the property was that as an heir to her grandmother and as such she could form no stock of descent and whatever the right of the daughter of the daughter's daughter as Bandhu of the husband (the Allahabad view is against such right), she would have had no right to come in as a descendant of the lady whose stridhana the property was. Nor is the ultimate conclusion that the daughter's son's son is nearer than the daughter's daughter's son so obvious as in point of degrees both are equally related and in point of spiritual efficacy, neither of them would seem to offer a pinda. The subject is enveloped in great doubt, thanks to the confusion introduced by the Privy Council by its recent pronouncements.

Nor is the case quite clear on the point of construction; there was the word "malik" and a further clause that the donor

1. (1914) I L R 38 M 807 : L R 41 I A 314 : 27 M L J 30 (P C).
2. (1919) I L R 42 M 647 : 37 M L J 93 (F B).
3. (1915) I L R 39 M 608 : 30 M L J 21.

and his heirs shall have no more claim in respect of the property coupled no doubt with a restriction as to alienation. If the grant were a modern grant, agreeably to the more liberal view now prevalant as regards such grants, the more correct construction would have been to view it as an absolute grant disregarding the subsequent clause restraining alienation as a repugnant clause. The document in this case was dated 1869 and the Court apparently felt justified having regard to the views then prevalant in putting a narrower construction.

A further question was as to the burden of proof that is to say as to the onus lying on a person claiming as reversioner to allege and to prove the non-existence of a nearer relation. Their Lordships say that the onus is only to satisfy the court that to the best of his knowledge there are no nearer heirs and that it is for those who allege the contrary to prove if they can, the existence of nearer heirs, *Rama Row* v. *Kuttiya Goundan* (1). The observations were not quite necessary for the decision as there was in fact evidence that the plaintiffs were the nearest in the depositions of the defendant's witnesses themselves. In the view that the grant was an absolute grant, plaintiff had no title when he brought the suit but as the daughter's daughter died pending the appeal, the court felt justified in Second Appeal in confirming the decree given to the plaintiff. Here, the plaintiff had no right at the time of the suit to the property and we should think that it is a rather violent exercise of the power of amendment possessed by courts though there are some precedents in support of the course adopted.

MOHAN LAL *v.* KALI CHARAN, (1927) I L R 49 All. 788.

Even under the old Code, in which there was no provision for notice of the settlement of proclamation of sale, the Privy Council held in *Arunachalam* v. *Arunachalam* (2) that a judgment-debtor who was aware of the insufficient description in the sale proclamation and did not object could not afterwards take advantage of the defect and make it a ground for setting aside the sale. That ruling would *a fortiori* apply to sales under the present code where specific provision is made for notice.

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1. (1916) I L R 40 M 654 : 30 M L J 514.
2. (1888) I L R 12 M 19.

PHUL SINGH *v.* BHOJRAJ, (1927) I L R 49 All. 801.

In this case, there is a discrepancy between the facts as stated in the head-note and the facts as appear in the judgment. On the facts as stated in the head-note the point is obvious *viz.*, that where there is a reference by members of the family authorising the arbitrator to apportion the liability in question between members of the family, that amounts to an acknowledgment. The facts as appearing in the judgment are that both the liability of the family and the question of apportionment was left to the arbitrator. That would give an altogether different complexion to the case. The parties make no admission of liability and make no promise to pay what the arbitrator might decide to be due. The arbitrator is only in the position of a judge. His decision would be binding on the parties to the reference but he is not a person who is authorised to make an acknowledgment on behalf of the party. The award furnishes a cause of action but that is apart from any volition or admission of the party referring and is available only to parties to the reference. On a somewhat similar line of reasoning it was held in *Krishna Reddi* v. *Thambu Reddi* (1) that the finding of the arbitrator on a reference by members of a Hindu family with a view to partition, that a debt was binding on them was no evidence at all in favour of the creditor who was not a party to the reference.

BANSIDHAR *v.* SAMPAT KUMAR SINGH, (1927) I L R 49 All. 806 (F. B.)

In this case, the hearing was postponed with a view to impending legislation to nullify the effect of the Privy Council decision in *Dayal Singh* v. *Indar Singh* (2) as to the necessity of registration for agreements for sale of land reciting receipt of consideration of more than Rs. 100 and as the amendment purports to be *retrospective* in that such a document "shall not be deemed to require or even to have required registration", the case had the benefit of the legislation.

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1. (1902) I L R 26 M 28. 2. (1926) 24 A L J 807.

SIKANDAR KHAN *v.* BALAND KHAN, (1927) I L R 8 Lah 617.

This judgment gives very cogent reasons for holding that the right of appeal now expressly conferred under O.43, R. 1, cl. (*w*) of the Civil Procedure Code against an order granting a review is defined and controlled by the provisions of O. 47, R. 7 corresponding to the old S. 629. Any other construction will render O. 47, R. 7 absolutely superfluous and such a view is obviously against the well-established rules of construction relating to interpretation of statutes. The decision of the Bombay High Court in the contrary sense in *Dass* v. *Karbasappa* (1) is rightly dissented from as being opposed to both principle and authority. The apparent conflict between the two rules is properly reconciled by holding that the right of appeal conferred under the earlier rule is regulated by defining its extent and ambit under the latter rule.

MAUNG PO GYI *v.* MAUNG MIN DIN, (1927) I. L. R. 5 Rang. 561.

The decision of the Privy Council in *Hira Bibi* v. *Ram Hari Lall* (2) must be taken to have definitely established that the rule as to attestation of a mortgage deed laid down by S. 59 of the Transfer of Property Act is one affecting the validity of the instrument and is not merely a rule of evidence affecting the proof of the document. This rule is in no sense affected by the recent amendment to the Transfer of Property Act defining the meaning of the word "attested" (Act XXVII of 1926). A mere admission of execution of the mortgage-deed by the mortgagor will not dispense with the necessity of proving that the document is duly attested, where there is a denial of the validity of the document in the written statement, as S. 70 of the Evidence Act can only apply in the case of a document either admitted or proved to be duly attested. There can be no question therefore of the invalidity of a document which bears on its face an attestation by only one person as in the case under notice. As the mortgage-deed was on the face of it invalid for want of attestation by two witnesses at least it was rightly held that a mere admission by the mortgagor that he executed the document was not a sufficient legal basis for upholding the mortgage.

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1. (1925) I L R 27 B L R 1446.
2. (1925) I L R 5 Pat. 58 : 49 M L J 240 (P C).

BHAGWAN DAT SHASTRI *v.* RAJA RAM, I. L. R. 49 All. 705.

This is a curious decision. It was held that the promise to pay 1|10th of the decree money to a man who was to perform a *pooja* for securing success in the suit was against public policy and was unenforceable. The ground of the decision is that the intention of the parties was that the plaintiff should exercise some influence unauthorised by law on the mind of the Court. One might, according as his temperament leads him, regard all prayer as superstition and as incapable of bringing about the object. In that view, such an agreement would be one vitiated by impossibility. It is difficult to appreciate why in a case where the righteousness of the claim of the plaintiff is vindicated by the decree, the intention of the parties should be regarded as one of a sinister kind. Possibly, the fact that the agreement was to pay a certain proportion of the decree amount had considerable part in inducing the conclusion.

BAZ BAHADUR SINGH *v.* RAGHUBIR PRASAD, I. L. R. 49 All. 707.

In the body of a mortgage document, it was recited that a portion of the consideration money was received before the Registering Officer but his endorsement showed that a lesser amount had been paid before him. Mr. Justice Mukherjee, rightly we think, regards the case as one of not even an admission—as the statement recited only an expectation and this expectation was belied by the registrar's endorsement. What the lower court did in the case was to treat the recital as an admission so far as receipt of money went disregarding the further statement that it was received at the registration. Mr. Justice Ashworth takes exception to this course and finds fault with the cutting up of the admission in this fashion. There is a rule that an admission in pleadings should not be cut up in that fashion but we are not aware of any rule similarly restricting the Court in its appreciation of evidence—though it is bound to admit in evidence the whole of the statement and ordinarily would not cut up the admission in that manner in the absence of other evidence as to payment.

ABDUL GHANI *v.* CHIRANJI LAL, I. L. R. 49 All. 726.

In this case, Mr. Justice Mukherjee holds that the extra period within which a suit can be filed having regard to S. 4 of the Limitation Act is a part of the period prescribed and an acknowledgment during the period is sufficient to save limita-

tion. The contrary view taken in *Bai Hemkore* v. *Masamalli* (1) has not been adhered to in the Bombay Court itself. The period of extra two years under S. 31 has been held to be time prescribed within the meaning of S. 4, but curiously enough S. 4 regards the period as outside "the period prescribed", the language used in S. 19.

In re : THE UNION INDIAN SUGAR MILLS CO., LTD. *v.* BRAIJ LAL JAGANNATH, I. L. R. 49 All. 728.

It is settled bankruptcy law that the official assignee is not bound by the judgment against the insolvent, or, any admission or covenant by him. If the Court has reason to doubt their *bona fides*, it has power to go behind them. In the case of judgments the Court need not be satisfied that they were procured by fraud or collusion as in the case of parties and their representatives.

RAGHUNATH PRASAD SAHU *v.* MUSSAMUT RAMPIARI KUER, I. L. R. 6 Pat. 687.

There is nothing in O. 44, Rules 1 and 2, which requires that the Court should make the inquiry into the pauperism of the appellant only after it decides that the proposed appeal is otherwise competent. Where the Court orders notice on the question of pauperism without in any way deciding whether the decree is contrary to law or some usage or otherwise erroneous or unjust, it would be wrong to hold that the court cannot go into that matter later on. The decision in *Mussamat Bachan Dai* v. *Jugal Kishore* (2) was really a case where at an earlier stage the court had decided that the appeal was otherwise competent, the proviso to O. 44, R. 1, being satisfied, and allowed the application subject to proof of pauperism. Even in the present decision the head-note does not seem to be correct as the judgment proceeds on other considerations and the proposition extracted in the head-note was really obiter.

BIGAN SINGH *v.* KING EMPEROR, I. L. R. 6 Pat. 691.

After the pronouncement of the Privy Council in *Abdul Rahiman* v. *King-Emperor* (3) it cannot be taken that every disobedience to an express provision of law as to the mode of a criminal trial is an illegality which cannot be cured under S. 537 of the Criminal Procedure Code. The authority of the decision

1. (1902) I L R 26 B 782. 2. (1924) 8 Pat. L T 119.
3. (1926) L R 54 I A 96 : I L R 5 R 53 : 52 M L J 585 (P C).

in *N. A. Subramania Aiyar* v. *King-Emperor* (4) is considerably weakened by the explanation of their Lordships of the precise scope and effect of the earlier case in the later decision. While it is true that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused, the courts will still have to decide on the applicability of S. 537 with reference to the object and scope of the provision of law which is disobeyed. In the particular case, the examination-in-chief of one of the prosecution witnesses recorded on a previous day was read out again in the presence of the accused and the vakil who acquiesced in the course was allowed to cross-examine. No prejudice was alleged or proved. In the circumstances the court may well have held that the irregularity was cured by S. 537 and that the trial was not a nullity.

SOMAR SINGH *v.* DEONANDAN PRASAD SINGH : I. L. R. 6 Pat. 781.

While an application under O. 34, R. 5, Civil Procedure Code, for obtaining a final decree in a mortgage suit will be governed by Article 181 of the Limitation Act, 1908, there can be no doubt that applications to enforce the final decree are all execution applications which will be governed by Article 182.

On the second point decided in the case, the language of Article 182, cl. (2) may be susceptible of the construction adopted by the Judges but there will be no real difficulty in such cases, as the party can apply for a fresh final decree within three years of the date of disposal of the appeal against the preliminary decree. The application for execution of the final decree obtained in pursuance of the preliminary decree of the first court may easily have been amended into one for passing a fresh final decree in pursuance of the appellate judgment and for execution of the same. There can be no objection to such a course as the applications will be in time both under Article 181 and Article 182.

PAHLAD RAI *v.* SHIV RAM : I. L. R. 8 Lah. 681.

The meaning of the word 'judgment' in the clause of the Letters Patent allowing an appeal from the decision of a single Judge of the High Court has been the subject of conflicting decisions and there are now Full Bench judgments in the various High Courts which lay down the general test. Still there is a considerable conflict of decisions with regard to

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4. (1901) L R 28 I A 257 : I L R 25 M 61 : 11 M L J 233 (P C).

various particular orders. An order transferring a particular case from one court to another has been held by the Madras High Court in *Krishna Reddy* v. *Thanikachala Mudali* (1) to be a 'judgment' while the contrary view is held in Calcutta. [See *Khatisan* v. *Sonairam* (2).] A refusal to transfer however stands on a different footing and the Lahore Court holds in the above decision that it is not a 'judgment' as the effect of the order is not to put an end to the suit in the court in which it is pending. A recent decision of the High Court of Madras also takes the same view—*Narasa Reddi* v. *Mahomed Ayoob Sait* (3).

MUHAMMAD ISMAIL *v.* THE CROWN, I L R 8 Lah. 647.

S. 197 of the Criminal Procedure Code which requires a previous sanction of the Local Government as a condition precedent to a Criminal Court taking cognisance of certain classes of offences by some public servants has always been difficult of application to concrete cases and the various changes in the phraseology of the section in the successive codes has not yet cleared the difficulty which the Courts have experienced in defining the class of offences which come under the purview of the section. As pointed out by the Madras High Court in a recent judgment, *Kamisetti Raja Rao* v. *Ramasami* (4), even the latest amendment made in 1923 still causes difficulty and the change of language suggested by Justice Jackson in the above judgment is certainly an improvement which will bring out clearly the obvious intention of the legislature. The essence of the matter is certainly this: "It is no part of the British policy to set an official above the common law. If he commits a common offence, he has no peculiar privilege, but if one of his official actions is alleged to be an offence then in certain cases and in the case of certain public servants, a previous sanction is essential." Judged by this test the decision under notice rightly holds that S. 197 had no application to the facts of the particular complaint as laid. In this connection the observations in *Sheik Abdur Kadir Saheb* v. *Emperor* (5) will be found to be noteworthy.

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1. (1923) I L R 47 M 133 : 45 M L J 153. 2. (1920) I L R 47 C 1104.
3. (1927) 27 L W 163. 4. (1927) I L R 50 M 754 : 52 M L J 647.
5. (1916) 1 M W. N 384.

CHANDI PRASAD *v.* JUMNA : I. L. R. 49 All. 830.

The judgment-debtor died in this case after order for sale but before notice for sale proclamation was issued and no notice was issued to the judgment-debtor's representatives. The question was as to the effect of such omission on the sale which took place. Their Lordships held that the sale was wholly void. The argument, it must be confessed, is not convincing. It is one thing if it is said that S. 50, Civil Procedure Code, contemplates an application for execution in all cases of death of the judgment-debtor, whatever the stage at which the death might take place, or that the process of substitution of legal representative contemplated in O. 22, being unknown to execution [See *Hope P. & Co.* v. *Hamel and Harley, Ltd.* (1)], a fresh application for execution is to be put in in all cases, for, in that case, O. 21, R. 22, would require notice to the legal representatives and a sale in the absence of such a notice would be wholly void. *Rajagopala Aiyar* v. *Ramanujachariar* (2). But if that view is not accepted as apparently their Lordships held in this case, then the sale is bad only on the ground of want of notice under O. 21, R. 66. It is difficult to see why want of notice under that section should be regarded as more than an irregularity. We should think that absence of notice under O. 21, R. 66, is but an irregularity coming within O. 21, R. 90. At any rate we have the authority of the Privy Council that misrepresentation as to value is only an irregularity in the publication and conduct of sale. In *Krishna Pershad Singh* v. *Moti Chand* (3), their Lordships of the Privy Council deal with absence of notice of attachment and subsequent proceedings to the legal representative as material irregularity within S. 311, Civil Procedure Code (old Code). In *Jagan Nath* v. *Daud* (4) and *Neely Neithiar* v. *Subramania Moothan* (5), absence of notice has been held only an irregularity; in the former as an irregularity within O. 21, R. 90, in the latter as not falling within that rule but still only an irregularity not vitiating a sale without proof of substantial injury. [See *Bipin Behari Bejali* v. *Kanti Chandra Mandal* (6), contra *Ramaswami Chetty* v. *Ma-U-Tha* (7).] There is another principle apart from that involved in the necessity for notice

1. (1925) I L R 49 M 1 (P C).
2. (1923) I L R 47 M 288 : 46 M L J 104 (F B).
3. (1913) L R 40 I A 140 : I L R 40 C 635 : 25 M L J 149 (P C).
4. (1923) I L R 4 Lah. 243.
5. (1919) 11 L W 59.
6. (1913) 18 I C 715.
7. (1916) 11 Bur. L T 40.

under O. 21, R. 66, or O. 21, R. 22, which has been recognised in various cases, *viz.*, that the property of a dead man cannot be sold without the representatives on record—the steps taken already such as attachment etc., being however available as against the representative [*Rajagopala Aiyar* v. *Ramanujachari* (2), *Krishnayya* v. *Unnissa Begam* (8), *Groves* v. *The Administrator-General*. (9) *Ragunatha Swami Aiyangar* v. *Gopala Rao* (10), contra *Doraswami* v. *Chidambaram Pillai* (11)]. In that view, the sale would be bad.

MADHURI SARAN *v.* BISHAMBHAR NATH : I. L. R. 49 All. 839.

In this case, the Court refused to take a technical view of the matter and held that a deposit of a part by one judgment-debtor and of the balance by another under O. 21, R. 89, may be treated as the deposit of the whole by them both so as to enable the Court to set aside the sale.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* BHAGWAN DAS AND B. N. W. RAILWAY, I. L. R. 49 All. 889.

It is very much to be regretted that in cases dealing with construction of documents, cases should be reported without the terms of the document being fully set out. The whole thing turns on the exact words used, but we do not have the words. So far as one could gather from the facts as they appear from the judgment, the questions in the case were—whether non-delivery is included in the word "loss" and, even if it did, whether non-delivery of part of a load was so included and finally whether, when on the facts appearing or admitted by the defendant company inference of misconduct could be shown to arise, it was necessary for the plaintiff to give specific evidence as to the misconduct of defendant's servants. Their Lordships held on the first two questions in the affirmative and on the last in the negative. On the second question, Mr. Justice Daniels had held in *Secretary of State for India* v. *U. P. Glass Works* (1) differently. Their Lordships disapprove of that decision.

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1. (1926) I L R 48 A 584.
2. (1923) I L R 47 M 288 at 306 : 46 M L J 104 (F B).
8. (1891) I L R 15 M 399. 9. (1898) I L R 22 M 119 : 8 M L J 288.
10. (1921) 41 M L J 547.
11. (1923) I L R 47 M 63 : 45 M L J 413.

Debi Das *v.* Maharaj Rup Chand : I L R 49 All. 903.

Although it might be open to argument whether an order rejecting the claim of a mortgagee not in possession on an attachment to have his mortgage recognised would amount to an order under S. 282 (corresponding to O. 21, R. 62), as that section only gave the Court a discretion "to continue the attachment subject to such charge" and said nothing about rejecting the claim, as S. 281 (corresponding to O. 21, R. 61) did, and consequently whether S. 283, which makes only orders passed under S. 280, S. 281 or S. 282 conclusive, would apply to a case of disallowance of the claim of the mortgagee, there could be no question that under the present Code, which makes any order made against the party conclusive, it would be so apart from the question whether it is under O. 21, R. 60, R. 61 or R. 62. We agree, however, with the learned Judges of the Allahabad High Court in the present case that, even under the old Code, there is no reason why such an order should not come under S. 280 (O. 21, R. 60), or S. 282 (O. 21, R. 62). An order refusing to release an attachment or refusing to recognise a claim of the mortgagee, is as much an order under either of the sections as one recognising it. A somewhat similar question arose in *Venkatasami* v. *Stridavamma* (1), *viz.*, whether an order declining to appoint a receiver was an order passed under S. 503 within the meaning of S. 588, as the former section only said that the court may appoint a receiver in specified circumstances. Their Lordships held that it was an order under S. 503 and therefore an appeal lay. In *Suppi* v. *Kunhi Koya* (2) it was held that an appeal lay from an order, refusing to punish a man for breach of an injunction under O. 39, R. 2 (3), under O. 43, R. 1 (*r*), though the former rule says that "the Court may order ...." and the latter rule provides only for an appeal against an order under O. 39, R. 2. *Durga Prasad* v. *Mansa Ram* (3) and *Ganesh Krishna* v. *Damoo* (4) holding to the contrary were both passed under the Code of 1882 and were therefore distinguishable though the learned Judges disapprove of the reasoning in those cases.

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1. (1886) I L R 10 M 179 (F B).
2. (1916) I L R 39 M 907 : 30 M L J 523 (F B).
3. (1904) I A L J 531.
4. (1916) I L R 41 B 64.

EMPEROR *v.* BALU RAM. I. L. R. 49 All. 913.

"What is gambling in a public place?" was the question in this case. As rightly observed by Mr. Justice Sulaiman a place would not be a public place unless the public had by right, permission or usage or otherwise access, not necessarily generally, it may be even on the particular occasion in question, and the mere fact that it is open to public gaze from the public street would not make the place a public place. As said in *Emperor* v. *Sukhnandan Singh* (1), the permission to the public need not be express; if they are not refused entrance that may be sufficient.

BANMARI LAL *v.* NAND RAM, I L R 49 All. 923.

Where the mortgagee omits to make the transferee of a part of the mortgaged property party to his suit and sells the property and purchases it himself, can he, after the period of limitation for his suit for sale has expired, call upon the transferee to redeem him, was the question their Lordships had to consider in this case. Whether that is the right kind of decree to pass or whether a decree for sale is the right decree to make, there is a considerable amount of conflict between courts and between the various decisions of the same court, some holding that a second suit for sale is the only remedy while others hold that the mortgagee has the right to call upon the latter to redeem him (the question having mainly arisen in the case of prior and puisne mortgagees). But there could be no question we think that either right can be exercised only if the right to sell is subsisting, the right to call upon the defendant being ancillary to such right of sale and incapable of standing without it. Whether such a mortgagee in the position of a defendant would be in a better position is again a matter for difference of opinion. Where as a mortgagee he is not entitled to possession it is difficult to find a legal basis for such advantageous position. A simple mortgagee, finding himself in possession might possibly be liable to account under S. 76, Transfer of Property Act, but that he should, thereby, become changed into a usufructuary mortgagee would seem to be an impossible process of transmutation.

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(1) (1921) I L R 44 A 265.

MAHARAJA OF PITHAPURAM *v.* RAMA RAO, I. L. R. 50 Mad. 770 : 53 M. L. J. 329.

In spite of the Full Bench judgment in *Tulja Ram Row* v. *Alagappa Chettiar* (1), the question as to what is a judgment and what is not within the meaning of cl. 15 of the Letters Patent, is still a matter of great doubt in the Madras High Court itself, not to speak of the divergence between the various High Courts. The test adopted by the majority in *Tulja Ram Row* v. *Alagappa Chettiar* (1) (Mr. Justice Ayling gives no reasons) is, not whether a particular judgment involves the exercise of a discretion or not, not whether it is an adjudication on the rights of the parties or not, nor again whether it is interlocutory or final, but whether the proceeding would or would not terminate the suit or proceeding before the court, except in the case of subsidiary or ancillary proceedings like application for injunction, arrest or receiver, where the order, whichever way it might go, would be a judgment. It is not quite clear from the judgment as regards the first part of the rule whether according to their Lordships the adjudication or the nature of the proceeding is the material point or the proceeding actually terminating the suit is the material point. But the various illustrations given would seem to show that the former is the test. Their Lordships approve of the judgment in *Vaghoji* v. *Camaji* (2), where it was held that an appeal lay from an order dismissing a Judge's summons to show cause why leave granted under cl. 12 of the Letters Patent should not be rescinded, and the judgment in *Howard* v. *Wilson* (3), where an order refusing to confirm an award made in the course of a suit was held to be appealable, which shows that the order need not have the effect of terminating the suit but the proceeding must be such as to terminate the suit if it is one taken in connection with a suit or it must be a proceeding preliminary to a suit like an application for leave to sue in *forma pauperis* or an application after termination of suit like a review proceeding. Acting on that view, their Lordships hold in this case that an order rejecting an application to rescind the leave granted under cl. 12 is appealable, but add a rider possibly justified by the circumstances of the case, *viz.*, that in this case the leave to sue was not objected on the ground that on the facts, leave should not have been given but that, in the

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1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).
2. (1904) I L R 29 Bom. 249.
3. (1878) I L R 4 C 231.

case, the court had no jurisdiction to give leave. Their Lordships thought the lower court had not finally decided the question but had merely postponed decision or at best had given only a sort of tentative decision. On that sort of tentative decision, the court could not of course rescind the leave given. In deciding the question of leave, the court has two questions to decide; first, whether at all it is a case in which leave could be given, secondly, whether, assuming the court had jurisdiction, leave should be given. On the second ground, the leave given was not impeached. On the first according to their Lordships there was no final decision. One should have thought, the court having rejected the application for rescinding leave on the view that a tentative decision on the question of jurisdiction would suffice, there was a final disposal of the application relating to leave and an appeal lay from the order, though the only order that could be passed was the order directing the lower court to determine the question finally. Finality of the decision on the subsidiary questions that arise would not seem to be an essential requisite according to the Full Bench decision above referred to. Insistence on it would seem to be a refinement engrafted by this decision on the rule laid down in that case.

THE OFFICIAL ASSIGNEE OF BOMBAY *v.* OBLA KUNA MUNA SUNDARACHARI, I L R 50 Mad. 776 : 53 M L J 209.

Cases have laid down that transactions bad under Ss. 53 and 54 of the Provincial Insolvency Act of 1920 or the corresponding sections of the Provincial Insolvency Act, 1907, are not void as such but have got to be set aside by the Insolvency Court on proceedings taken under the sections and cannot be got rid of by regular suit in ordinary courts or be impeached collaterally by the Official Assignee by way of defence. *Mariappa Pillai* v. *Raman Chettiar* (1) and *The Official Receiver, Coimbatore* v. *Palanisami Chetti* (2). A distinction was sought to be made in this case between the Provincial Insolvency Act and the Presidency Towns Insolvency Act. It is the bane of Indian Legislation that it is never consistent except in its embarrassing inconsistency in language. Instead of adopting the language of English Statutes which have had long judi-

1. (1918) I L R 42 M 322.
2. (1925) I L R 48 M 750 : 49 M L J 203.

cial interpretation or of adopting some consistent phraseology, it adopts one phraseology in the Provincial Insolvency Act and another in the Presidency Towns Insolvency Act. These are not the only matter on which there is such, so far as one could see, wholly purposeless divergence (*vide* sections relating to the effect of ***death***, as to the kinds of property vesting, as to annulment on the insolvent failing to apply for discharge among others). The language of the Presidency Towns Insolvency Act is the language of the English Bankruptcy Acts and there is no reason why the same construction as is adopted by English Courts, *viz.*, that it is only voidable should not also be adopted in this country. The Insolvency Court is the tribunal exclusively constituted for the purpose of trying such questions and it should be embarrassing in the extreme to have conflicting judgments of various courts on the same question.

CHOKKALINGAM CHETTIAR *v.* ATHAPPA CHETTIAR, I L R 50 M 800 : 53 M L J 364.

The doctrine of fraud on registration introduced by the Privy Council like the other doctrine about the necessity for the witnesses for attesting to be present at the execution happily abrogated by the legislature serves as a powerful ally to dishonest debtors who, after joining the creditor in perpetrating a fraud on the registration law, seek to make use of it against him. An attempt was made in this case to bring within the rule a case where a small bit of property belonging to the mortgagor was included in a mortgage with a view apparently to have registration in the particular Sub-Registrar's Court, within whose jurisdiction the small bit of land was situate, though it could not be said at the same time that the property was not intended to be security as well as the other land. Their Lordships hold that the case is not within the rulings of the Privy Council relating to fraud on registration law. They say that those rulings will apply to cases (*i*) where there is no such property, (*ii*) where there is such property but does not belong to the mortgagor, (*iii*) where in respect of the property the document was not intended to be operative but was only a blind.

U. TEZA *v.* MA E GYWE AND OTHERS, I L R 5 Rang. 626.

This is a rather curious decision dismissing an action in ejectment brought by a Bhuddist monk against the defendants who sold a house to him. On the ground that under the personal

law of a Bhuddist monk he is incompetent "to engage in any transaction in which silver is used" and that he cannot enter into a transaction of buying and selling. No doubt the texts quoted in the decision from the *Vinaya* lay down the disqualification. But it is far from clear that these texts are not rules of moral obligation. The observations of the Privy Council in *Balwant Singh* v. *Rani Kishori* (1) and in *Balasu Gurulingaswami v. Balusu Ramalakshmamma* (2) as regards the caution required in interpreting books of mixed religion, morility and law are well worth remembering. The argument based on the theory of civil death by entering a holy order is neither conclusive nor convincing. The reference in the ancient books to rules regulating the disposal of the property acquired by a monk by agriculture or trade or by usury seems to suggest a legal recognition of the right of property in such acquisitions by a monk though the action of the party may be morally blameworthy. Even apart from this, there is a degree of vagueness in the texts quoted, as regards the class of transactions which come under the prohibition. Would a case of acquisition of property by seizeure or finding be within the rule? There is a good deal to be said against the view that has been found favour with the learned Judge and we think that the question while not free from difficulty has not been considered in all its aspects.

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1. (1898) L R 25 I A 54 : I L R 20 All 267 (P C).
2. (1899) L R 26 I A 113 : I L R 22 Mad. 398 : 9 M L J 67 (P C).

MUTHIA CHETTIAR *v.* KARUPPAN CHETTI, I. L. R. 50 Mad. 786 : 53 M L J 606.

The authority of counsel to compromise seems to be generally accepted in English Courts though that authority will not extend to compromising matters collateral to the action and there is also considerable doubt as to the extent to which court will interfere when the action of the counsel is against the express instructions of the client. In *Neale* v. *Lennox* (1) the Court of Appeal approved of the statement of Lord Alverstone, C. J., on the law viz., that "counsel appearing for a party in an action is held out as having full authority as to all matters which relate to the conduct of the action and its settlement and further that notwithstanding a limit may have been placed upon the authority of counsel, the party for whom he appears is bound by such settlement, unless the fact that the counsel's apparent authority had been limited was communicated to the other side". The Court of Appeal would seem to admit however that counsel's misapprehension or mistake as to the extent of authority in fact given to him is a ground for setting aside the compromise. That case went on appeal to the House of Lords and there a further distinction was made on which the judgment of the Court of Appeal was reversed, viz., that if something further has got to be done by the Court in pursuance of the arrangement, the court may well refuse to enforce it when it is brought to its notice that the client was not a consenting party to the arrangement. As Lord Macnaughten puts it "I do not think the Court is entirely in the hands of the counsel and bound to give the seal of its authority to any arrangement that the counsel may make when the arrangement itself is not in its opinion a proper one" and in the next place "I do not think that any counsel has authority to compel his client to refer an action which the client desires to try in open court"—that was a case of reference to arbitration.

So far as vakils and pleaders go, the trend of opinion is against authority to compromise or refer to arbitration, though the Calcutta Court is for presuming the existence in fact of such authority in the absence of clear evidence to the contrary.

The point that arose in this case was as to whether concession made by the counsel was a concession as to the subject-matter of the suit or as to a matter collateral to the suit. An agent of a Nattukottai Chetti operating in Singapore and sur-

1. L R (1902) 1 K B 838.

rounding area got a release from the subsequent agent in respect of the principal's claims on the former recognising the latter's right to the various documents taken by him and on certain other terms. In respect of certain mortgages in the name of the agent, it became necessary for the principals to have a transfer from the agent. The agent refused to consent to a decree from the court directing such transfer unless the release was ratified by the principals. Counsel agreed to such a course and expressly admitted that the release was ratified in toto by the principals. The question was whether this admission bound the principals. The argument was that the admission was in respect of a collateral matter and would not bind the principals. Their Lordships held that it was not a collateral matter but one that directly arose in the suit.

S. M. A. R. A. L. FIRM *v.* R. M. M. A. FIRM, I L R 5 Rang. 773.

In view of the conflicting decisions as to whether Act XXVII of 1926 defining the word 'attested' in the Transfer of Property Act, 1882, was retrospective or not, the Legislature passed Act X of 1927, for the express purpose of settling the question by giving retrospective effect to the amended definition. The decision under notice therefore applies the definition of the word "attested" as it now stands to transactions of mortgage executed prior to the Act of 1926. It may, however, be noted that Act X of 1927 is somewhat loosely drafted as S. 4 of the Act seems to nullify the effect of S. 2 thereof with reference to this particular amendment in the schedule. The subsequent re-enactment of the said S. 4 as S. 3 of Act XII of 1927 also contains the identical saving clause. A literal construction of the terms of S. 3 and S. 4 will go to show that the two Acts of 1927 cannot give any retrospective effect to the amended provisions of Act X of 1927. The real intention of the Legislature was merely to give no retrospective effect to the repealing portion of the said Act and not to the amending portion thereof, but the language used seems to be unhappy. The difficulty is mainly due to the Legislature having adopted the curious way of providing for a particular case of an amendment intended to have retrospective effect in a general repealing and amending Act with the usual safeguards.

BUDHA MAL *v.* RALLIA RAM, I L R 9 Lah. 23.

The Lahore High Court has reiterated the view already taken by it in several cases that in respect of suits like one for accounts where in the first instance a tentative valuation is made by the plaintiff, the forum of appeal is determined not by the amount fixed by the plaintiff in his plaint but by the amount found to be really due by the decree under appeal. The decision of the Full Bench of the Madras High Court in *Putta Kamayya Chetti* v. *Rudrabhatta Venkatanarasiah* (1), and the decision of the Allahabad High Court in *Muhammad Abdul Majil* v *Ala Baksh* (2) are specifically dissented from. The conflict of views is now so sharply defined that the matter can be settled by the Legislature only, in the absence of an authoritative pronouncement by the Privy Council.

KHUSHIA *v.* FAIZ MUHAMMAD KHAN, I L R 9 Lah. 33.

While we agree that an unauthorised transfer by an authorised guardian should be set aside within the period of limitation provided for by Art. 44 of the Limitation Act, the judgment under notice seems to require re-consideration as the alienation in question was one made by a person who cannot be described as the lawful guardian of the minor. The plaintiff being a Muhammadan, his mother is not a guardian under the Muhammadan Law. The sale by the mother of immoveable properties belonging to the minor will not therefore be binding on him : see *Imambudi* v. *Mutsaddi* (3). Art. 44 of the Limitation Act has no application to a suit to recover the properties, as such a sale is not effected by a guardian but by a wholly unauthorised person. See *Mata Din* v. *Ahmed Ali* (4). Art. 144 only can apply. It seems to have been admitted before the learned Judges that the mother was the guardian of the property of her minor son. This admission will not be correct unless it be that in the particular case the mother had been appointed executrix under the will of the father of the minor in which case only she could be the guardian under the Muhammadan Law.

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1. (1916) I L R 40 M 1 : 32 M L J 221 (F B).
2. (1925) I L R 47 A 534.
3. (1918) L R 45 I A 73 : I L R 45 C 878 : 35 M L J 422 (P C).
4. (1912) L R 39 I A 49 : I L R 34 A 213 : 23 M L J 6 (P C).

PURAN DAS *v.* EAST INDIAN RAILWAY COMPANY, I L R 6 Pat. 718 (F B).

This was a reference to the Full Bench for the purpose of deciding whether the term "loss" in the risk note Form B under S. 72 of the Railways Act included "non-delivery" to the consignee. There is a sharp conflict of views on the point. See *Great Indian Peninsular Railway Company* v. *Jitan Ram* (1), *East Indian Railway Company* v. *Jagpat Singh* (2). The Full Bench did not decide the point as it took the view that the pleadings in the case proceeded on an admission of loss of the consigned goods. We prefer the view taken by the Calcutta Court that the term "loss" means loss of the goods and not merely loss to the owner caused by the non-delivery of the goods by the Railway. The onus of proving "loss" within the meaning of the risk-note is in the first instance on the Railway Company, which seeks to exempt itself from liability to deliver by reason of the exemptions in the contract. It is true that a party cannot take the case out of the terms of the risk note merely by framing the suit as one for compensation for non-delivery. The question is one of substance and not of form. If the Railway Company can show that the goods are lost in the sense that it has lost possession of the goods involuntarily or through inadvertence and for the time being is unable to trace them, then it is exempt from liability unless the plaintiff proves "wilful neglect, *etc.*," in the terms of the proviso.

It is desirable that a question which arises so frequently should be authoritatively settled and it is regrettable that the Full Bench avoided giving a decisive ruling.

The conflict of views however will not be so embarrassing, as the risk note forms have now been radically altered and the new forms give greater facilities for the consignors of goods to safeguard their interests against the Railway Companies which never err on the side of giving more information as to the facts than what the law compels them to do.

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1. (1923) I L R 2 Pat. 442. 2. (1924) I L R 51 C 615.

FAKIR CHAND MANDAL *v.* DAIBA CHARAN PARNI, I L R 54 Cal. 1052.

The question in this case was whether, where an application for setting aside an *ex parte* decree is dismissed and an appeal against the order is also dismissed by the appellate court, the decree-holder could seek to execute his *ex parte* decree within three years of the order of the appellate court under the second clause of the third column of article 182 of the Indian Limitation Act. The learned Judges have answered the question in the negative and there is a large body of authority in support of the view of the learned Judges commencing from *Sheo Prasad* v. *Anrudh Singh* (1). There is however some difficulty in accepting the reasoning on which the decision under notice is based. The learned Judges have construed the second clause as referring only to cases where the decree or order sought to be executed has been appealed against. It has to be noticed in this connection that while most of the other clauses of the third column refer in terms to the decree or order spoken of in the first column, the second clause is significantly silent in this respect and there seems to be no reason to restrict its operation by reading into it words which are not there. Though there are some observations similar to those in the present case in *Jivaji* v. *Ramchandra* (2), we are not sure that they were necessary for the purpose of that case. Indeed, there is direct authority in the contrary direction in *Narsingh Sewak Singh* v. *Madho Dass* (3) where a decree passed on review was appealed against and the execution of the original decree was held to be in time under the second clause of the third column of article 182, although the decree sought to be executed was not appealed against and the learned Judges distinguished the case of *Sheo Prasad* v. *Anrudh Singh* (1) to which their attention was drawn. Again in a recent decision of the Patna High Court in *Somar Singh* v. *Deonandan Prasad Singh* (4), an appeal was preferred against the preliminary decree and, when the appeal was pending, a final decree was passed by the lower court and the question was whether an application for executing the final decree within three years after the appellate decree dismissing the appeal against the preliminary decree but after three years of the final decree of

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1. (1879) I L R 2 A. 273.
2. (1891) I L R 16 B. 123.
3. (1882) I L R 4 A. 274.
4. (1927) I L R 6 Pat. 780.

the first court, against which no appeal had been preferred, was in time; and the learned Judges answered it in the affirmative under the second clause of the third column. These two decisions are in conflict with the view that the learned Judges have expressed in the decision under notice regarding the second clause and have not been considered by them. It is therefore a matter for consideration whether on the proper construction of the second clause it is not applicable to all cases where the appeal reopens the suit or proceeding on which the decree or order sought to be executed is passed and imperils the decree or order in any way. If it is understood in this manner, the decision under notice as well the decisions in *Sheo Prasad* v. *Anrudh Singh* (1) and *Jivaji* v. *Ramchandra* (2) which it follows would stand good as, in each case, the appeal was directed against a collateral proceeding to set aside the *ex parte* decree and did not reopen the suit itself in which the decree sought to be executed was passed, though the result of the appeal might be to imperil the decree. Again, the decisions in *Narsingh Sewak Singh* v. *Madho Dass* (3) and *Somar Singh* v. *Deonandan Prasad Singh* (4) would remain unaffected, as, in these cases, the suit itself was under appeal and the decree sought to be executed was imperilled by the appeal. This is substantially the construction adopted in *Somar Singh* v. *Deonandan Prasad Singh* (4) and would seem to reconcile all the cases on the point.

BALMAKUNDA BISSESWAR LAL *v.* BENGAL NAGPUR RAILWAY CO., LTD., I L R 55 Cal. 26.

The main question in the case was as to the procedure available to a decree-holder in executing a decree for specific movables or for an ascertained amount in default. In the decision under notice, the judgment-debtor expressed his willingness and readiness to deliver the moveables themselves. That in such a case the decree-holder has only his remedy under the procedure prescribed in O. 21, R. 31 of the Code and cannot execute as in the case of a money decree under O. 21, R. 30, seems clear. The same view was also held in *Manavikraman*

1. (1879) I L R 2 A. 273.
2. (1891) I L R 16 B. 123.
3. (1882) I L R 4 A. 274.
4. (1927) I L R 6 Pat. 780.

v. *Moyankutti* (1) which the learned Judges have followed. Otherwise the specific provisions in the rule would be without a purpose. With regard to the objection that, in this view, the provisions of O. 21, R. 30, may to some extent be rendered nugatory, it may be answered that they may be applicable to cases where the decree-holder has the option given to him under the decree for the one or other of the reliefs which is not the case where his right to the money depends on the option of the judgment-debtor. It may also have reference to cases where the specific moveable decreed is not in the possession of the judgment-debtor, in which case, it has been held that the procedure, prescribed in O. 21, R. 31, need not be followed. See *Rajah Pudmanund Singh* v. *Chundi Dat Jha* (2).

On the other question, which the learned Judges have left open, *i.e.*, the question of limitation with regard to the execution of a portion of a decree which has not been appealed against, the matter seems both on principle and authority that, even though a portion of a decree has not been appealed against, when an appeal has been preferred against another portion of the decree, the decree-holder has three years from the date of the appellate decree, even for the unappealed portion, under Clause 2 of the second column of Article 182 of the Limitation Act. The decree is one and entire and cannot be said to be composed of a number of decrees clubbed together. Reference may be made in this connection to explanation (1) of the third column of the Article, where a dictinction has been made with respect to joint decrees. On principle also, an appeal being by way of re-hearing of the suit itself, even in cases, where only a portion of the decree is appealed against, the suit itself is re-heard in appeal though in part. The question has been fully discussed from the juristic point of view in *Krishnamachariar* v. *Mangammal* (3). The view that once found favour with the Calcutta High Court in *Christiana Sens* v. *Benarashi Prosad* (4) that the decree in such a case might be split into and conceived of as a number of decrees, leading to the result that the execution of the non-appealed portion may be barred within three years of the original court's decree and not from the decree of the appellate court, has since been dissented from in *Dewan Abdul Alim* v. *Abdul Hakim* (5). Reference may also be made in this connection to *Pancho Bama* v. *Anand Thakur* (6) and *Tula*

1. (1903) 13 M L J 444.
2. (1896) 1 C W N 170.
3. (1902) I L R 26 M. 91 (F. B.)
4. (1914) 19 C W N 287.
5. (1926) I L R 53 C. 901.
6. (1923) I L R 2 Pat. 712.

Ram v. *Bhup Singh* (7) where the possibility of the appellate court interfering under O. 41, R. 33 of the Civil Procedure Code, is also adverted to. Thus it seems clear that the point raised by the decree-holder that his application for executing the unappealed portion of the decree may be barred by limitation within three years of the original decree is one without substance and the decision of the case would have been the same even if the learned Judges had gone into the question.

MANMATHA NATH GHOSE *v.* LACHMI DEBI, I L R 55 Cal. 96.

We must confess to some difficulty in following the decision of the learned Judges in this case. A preliminary decree was passed in a suit for partition by some of the co-sharers against the others. The decree was *ex parte* in respect of some of the defendants and they applied to set aside the *ex parte* decree and the learned Judges have held that it is sufficient if the plaintiffs alone are made parties to the application to set aside the *ex parte* decree and the appeal therefrom and notice is served on them alone without serving it on the other co-sharer defendants. If this is sufficient under O. 9, R. 14 of the Civil Procedure Code, it is not easy to meet the difficulty raised by the respondent in the case, as to why the legislature should not have used the clearer word "plaintiff" rather than the expression "the opposite party". That the expression "opposite party" used in the rule means any party who would be affected by any possible order setting aside the *ex parte* decree was clearly laid down in *Jatindra Mohan Poddar* v. *Srinath Roy* (8). If that is the correct view and the nature of a suit for partition is as it is well understood and explained by the Privy Council in *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (9) referred to by the learned Judges, we fail to see why the other co-sharers though they are defendants do not stand on a similar footing to that of the plaintiffs themselves and should not be made parties to and served with the application for setting aside the *ex parte* decree. It would of course be different in the case of those defendants who are not interested in the partition, as for instance, the superior landlord whose presence would not be necessary for the partition of an under tenure.

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7. (1925) I L R 47 A. 913. 8. (1898) I L R 26 C. 267.
9. (1914) L R 41 I A 247 : 27 M L J 76 (P. C.)

TULA RAM SAH *v.* SHYAM LAL SAH : I L R 49 All. 848.

Prima facie, a Hindu residing in a province is governed by the Hindu Law obtaining in that place unless he alleges and proves that he migrated from another place where a different law prevailed. The presumption of the application of Hindu Law is rebutted by proof of usage. But where there is *prima facie* evidence of a usage obtaining among a certain class of people and when a member of such class pleads that he is governed by the Hindu Law, the burden would then lie on him to prove that he forms an exception or that there is no custom. This is what their Lordships lay down in this case. The custom was taken to be proved *prima facie* by a book published under the authority of the Government by Mr. Panna Lal, I.C.S., after an elaborate inquiry into the customs of the people of the place.

SUBBARAYUDU *v.* SECRETARY OF STATE : I L R 50 Mad. 961 : 53 M L J 868.

Two important questions arose in this case. So far as Indian law is concerned, it is settled law that to attract the presumption of crown-ownership of the bed it is not necessary that the stream must be both tidal and navigable. In England to raise the presumption, the river must be both tidal and navigable, so that all discussions in English cases as to the navigability of the river when the river is not tidal do not bear on the question of presumption of crown-ownership of the bed. Though the bed might vest in private owners, nevertheless it might be subject to rights of navigation on the part of the public by long immemorial user. Such rights might be qualified rights, their scope and extent being measured by the user. The fact that rights of navigation are recognised in any particular case in England cannot, therefore, afford guidance on the question as to whether a river can be said to be navigable in India, so as to raise the inference of crown-ownership. The rule is one evolved in India and its limitations are to be sought for in Indian decisions. The Indian decisions have laid down and the Privy Council has accepted the position in *The Secretary of State for India* v. *Maharajah of Burdwan* (1) that a river which is navigable only at certain seasons is not navigable within the meaning of the rule. This seems to be but right seeing that only in the case of navigability throughout the year exclusion of

1. (1921) L R 48 I A 565 : 42 M L J 61 (P C).

all inference of private ownership can properly be predicated. A stream that is not perennial or is not subject to public user at all times cannot be said to be incapable of private ownership so as to give rise to the necessary inference of crown-ownership. In this case, their Lordships also express the view that use for mere fishing craft does not satisfy the definition of navigation.

The second point involved is one on which there was considerable difference of opinion at one time, but since the *Uralam case, Prasad Rao* v. *Secretary of State for India* (2), opinion has been gradually precipitating in favour of that expressed in this case, *viz.*, that where one half of the stream belongs to a private owner and where he, in exercise of his rights as such riparian owner, uses the water, or, for the matter of that a riparian owner in the exercise of his rights as riparian owner uses the water, no matter to whom the bed belongs, the Government cannot levy water-cess under the Irrigation Cess Act. The extreme view taken in the earlier cases can no longer be sustained in view of the decisions of the Privy Council in *Prasad Rao* v. *Secretary of State for India* (2), *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India* (3) and *The Secretary of State for India in Council* v. *Maharaja of Bobbili* (4).

AKBAR ALI *v.* KING-EMPEROR, I L R 7 Pat. 61 (S B).

Of late, there have been various decisions of the Calcutta and Patna High Courts, in which different and conflicting views have been taken as regards the proper mode of constituting a jury for the trial of criminal cases. The question raised is as regards the correct interpretation of the terms "chosen" and "deficiency of number of persons summoned" in the proviso to S. 276, Criminal Procedure Code. As many as four different interpretations are possible of the relevant sections. See the decision of the Calcutta Full Bench in *Kedar Nath Mahato* v. *Emperor* (1). This decision and the Calcutta Full Bench decision both hold that there is to be no ballot where, owing to a deficiency of the required number of jurors, the court in its discretion proceeds to act under the proviso to S. 276 and constitutes the jury by selecting the additional jurors required from such other persons as may be present in court. The

2. (1917) L R 44 I A 166 : I L R 40 M 886 : 33 M L J 144 (P C).
3. (1917) I L R 40 M 909 (P C).
4. (1919) L R 46 I A 302 : I L R 43 M 529 : 37 M L J 724 (P C).
1. (1927) 47 C L J 43.

word "chosen" in the proviso does not necessarily mean "chosen by lot". The choosing by ballot in open court refers to an earlier stage in the proceedings and there is nothing in the section which authorises or justifies the view that the ballot box is to contain the names of persons other than those who have been summoned to act as jurors. Nor is there anything in the Code or the rules framed by the High Courts to show that there is to be a preliminary roll-call of the summoned jurors to see if they are present. A person summoned to act as juror is bound to come forward only when he is being called to take his place in the jury box, as the result of the ballot, under the terms of S. 277, clause (1). It is only after the ballot fails to supply the required number of jurors that the proviso comes into operation. We agree that the decision in *Bhola Nath Hazra* v. *Emperor* (2) was wrongly decided in so far as it holds that there must be a lot after including the persons selected from the public under the proviso.

DR. R. N. SINGHA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL, I L R 5 Rang. 825.

We agree that the plaintiff was ill-advised in the course which he adopted. A suit will not lie to set aside or modify an assessment made under the Income-tax Act. Where, however, the proceedings are wholly *ultra vires* of the Act, a civil suit will lie. The income that was assessed in this case was admittedly one which was liable to pay the tax. The plaintiff's grievance being merely that he could not be assessed to pay Income-tax on the income, as it belonged according to him to his wife, his obvious and only remedy was to avail himself of the procedure under the Act to have that income excluded from his taxable income. A mere error in describing him as proprietor and not manager of the business from which the income arose, in the notice calling on him to make a return of his taxable income, will not make the proceedings of the Income-tax officer wholly *ultra vires* so as to give him a right of suit in the civil court. The case is not one of want of jurisdiction but of a mere erroneous decision if at all by the Income-tax Officer in the course of proceedings entirely and properly within his jurisdiction as conferred by the Act.

With reference to the second contention raised in the case that S. 69 was *ultra vires* of the Indian Legislature, it is clear

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2. (1926) 44 C L J 541.

that S. 32 of the Government of India Act has no application to the present case. The present instance is certainly different from the case which was considered by the Privy Council in *Secretary of State for India* v. *Moment* (1).

MA KIN *v.* MAUNG PO SAIN AND OTHERS, I L R 6 Rang. 1.

This decision is no longer correct so far as it follows the authority of *Maung Po Nyun* v *Ma Saw Tin* (2) in laying down that in the case of a desertion by a Burman husband of his wife the latter will on divorce get a decree forfeiting her husband's share in its entirety in her favour. The Privy Council has decided in *Maung Po Nyun* v. *Ma Saw Tin* (3) that there is no authority or principle for the proposition that, 'because the defendant deserted the plaintiff, she was entitled to divorce with possession of *all* the husband's interest in the property'. The share to which the wife will be entitled in such cases will have to be determined with reference to all the circumstances of the case according to rules of justice, equity and good conscience.

COMMISSIONER OF INCOM-TAX *v.* *A. R. A. N.* CHETTIAR FIRM, I. L. R. 6 Rang. 21.

Under S. 30, cl. (1), proviso of the Indian Income-tax Act, 1922, no appeal shall lie in respect of an assessment made under Sub-section (4) of S. 23. This does not prevent the Court from deciding whether in a case where an assessment purports to be made under S. 23, cl. (4), the Income-tax authorities were justified in acting under that Sub-section. A reference under S. 66 of the Act will lie to the High Court for the purpose of deciding whether the assessment could legally be made under S. 23, cl. (4), but the High Court will not interfere with the actual assessment if it decides that there was jurisdiction for the income-tax authorities to act under S. 23, cl. (4).

It is of course a question of fact in each particular case whether a return submitted by an assessee without filling in the details as required by the statutory form prescribed by the Act is merely an incomplete return within the meaning of S. 23, cl. (1) or is 'no return' at all as required by the Act. This is a question of substance and not of mere form.

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1. (1912) L R 40 I A 48 : I L R 40 C 391 : 24 M L J 459 (P C).
2. (1925) I L R 3 R 160.
3. (1927) L R 54 I A 403 : I L R 5 R 841 : 53 M L J 425 (P C).

NARAYANAN NAMBUDRI *v.* THEVA AMMA : I. L. R. 51 Mad. 46 : 53 M. L. J. 824 (F. B.)

While on the one side it cannot be said that the position of the Karnavan is that of a trustee or that of the secretary of a corporation who represents the corporation, we nevertheless think that the junior members who are obviously not "parties to the suit" cannot either be regarded as representatives of the parties within the meaning of section 47 merely because they are taken as claiming through parties to the suit by force of explanation VI of Section 11, Civil Procedure Code, for the purposes of that Section. The purchaser of a property from the judgment-debtor after attachment is a representative *qua* that property in respect of questions that arise in respect of that property but not in respect of other properties of his own. Similary a purchaser in execution of a money decree pending a mortgage suit would be *qua* that property a representative, but not in respect of his other properties though the question might relate to execution of the decree. In both these cases the purchaser is not a *representative* but only a representative for limited purposes. Similarly a person bound under Section 11, clause vi. He is a representative for that limited purpose and, so far as that limited purpose is concerned, he may be a representative within the meaning of Section 47. A decree against the Karnavan as such is sought to be executed and a point is sought to be raised by a junior member that the decree has been satisfied or that the amount due under the decree is not as much as alleged by the decree-holder. In respect of these matters, he would be a representative, but, if a further question is raised whether the property is Tarwad property or not, then the question would no longer be one in respect of which he is a representative. The cases which hold that a legal representative is bound to put forward his private title in execution under Section 47 are distinguishable on the ground that the legal representative under the Hindu or Marumakkathayam law is as such no different *persona* from himself in his ordinary capacity, such a distinction not being recognised in those systems unlike in the Roman and the English systems. The point of view we have set forth above is fully elaborated by Mr. Justice Ananthakrishna Aiyar in his judgment and we think, with respect, the distinction pointed out by his Lordship is sound.

N. I. C.

VEERARAGHAVACHARIAR *v.* THE ADVOCATE GENERAL OF MADRAS : I. L. R. 51 Mad. 31 : 53 M. L. J. 792 (F. B.)

The question is not one capable of much argument. So far as S. 92, Civil Procedure Code, is concerned, it cannot be said to bear on the question as it does not prohibit the awarding of the reliefs grantable under the section on applications. It only prohibits suits. The real question, therefore, is whether the insertion of such clauses in a decree is *ultra vires.* That is a matter of procedure. The Privy Council in the *Tirupathi case, Prayog Doss Ji Varu* v. *Tirumala Srirangacharla Varu* (1), would seem to sanction such insertion. The seheme was settled in that case by their Lordships of the Privy Council of whom Lord Macanaghten was one with the assistance of Sir Robert Finlay to whose official experience as *Attorney General* their Lordships specially refer.

SUKDEDOSS *v.* GOVINDOSS : L. R. 55 I. A. 32 : I. L. R. 51 Mad. 96 : 54 M. L. J. 130 (P. C.)

In this case, their Lordships point out that to make a contract for sale of goods a wagering contract, it is not sufficient that delivery was not *expected* to be insisted upon or that it would have been considered bad form to do so, but that it should be found that it was a term of the contract itself that delivery of goods should not be insisted upon. In this case, there was a contract of sale and so long as there was no *potta potti* order for delivery, there was no impediment to the contract being enforced accordirg to its terms though it would have been bad form to have done so. Their Lordships, accordingly, held that the contract was not bad as a wagering contract. Their Lordships however dismissed the suit on another ground, *viz.*, that the appellant was not in a position to make the delivery, being at the time of the *potta potti* delivery order not in possession of the goods, and that the *potta potti* delivery order was not tantamount to a delivery so as to entitle the plaintiff to sue for the price but was only an arrangement by which plaintiff was no longer entitled to ask for delivery of the goods but only differences in price.

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1. (1907) L. R. 34 I. A. 78 : I. L. R. 30 M. 138 : 17 M. L. J. 236 (P. C.).

JAGANNATHA PILLAI v. KATHAPERUMAL PILLAI : I. L. R. 51 Mad. 76 : 53 M. L. J. 688.

This is another illustration of the thoroughly unsatisfactory nature of the provisions of the Estates Land Act. S. 192 says that all the provisions of the Civil Procedure Code save certain provisions, of which S. 313 relating to the setting aside of sales in execution on the ground of want of saleable interest is one, subject to such modifications as have been introduced by the Act, shall apply to proceedings under the Act. The question is whether application to set aside a sale on the ground of fraud or material irregularity in the publishing and conducting of sale lies and, if it does, whether a suit is precluded by reason of the provision of S. 312. The view of their Lordships is that S. 124 of the Act shows that such an application does not lie, that for the matter of that no order under S. 312 either confirming the sale or setting aside the sale except under S. 131 of the Act is contemplated by it. S. 124 says that if no application is made under S. 131 to set aside the sale, a certificate shall be issued to the purchaser and this provision in their Lordships' opinion clearly excludes an application under S. 311 (O. 21, R. 90). But S. 132 makes the provisions of Chapter VI only applicable so far as may be. It is not quite clear why the Revenue Courts should not be entrusted with the work of deciding the comparatively easy questions of fraud and irregularity in the publishing and conducting of sale and the reasons which induced the legislature to have those questions speedily decided equally apply to sales by Revenue Courts as to sales by Civil Courts. In fact S. 244 (S. 47) is not one of the sections excluded by S. 192. Chapter VI can by no means be regarded as a complete code so far as the execution of Revenue Court decrees is concerned. It has got to be supplemented by the provisions of the Civil Procedure Code relating to execution. Nor is it clear that appeals will not lie from such orders having regard to the definition of decree which excludes only orders under S. 47 from which appeals lie under O. 43. O. 43 being excluded, these particular orders would not come within the exception and by force of the main clause would be decrees from which appeals and second appeals might lie. Second appeals lie from rent decrees though they are, but for S. 189, of the nature cognisable by Courts of Small Causes. Analogous reasoning would justify the above

conclusion. Anyway, that the parties should have recourse to costly process of a suit to set aside a sale on any ground of irregularity could not have been in the contemplation of the legislature. The Full Bench decision in *Jagannadha Charyulu* v. *Satyanarayana Varaprasada Rau* (1) had not the obstacle presented by S. 47 to consider, whereas in the case of execution sales whether by Revenue Courts or by Civil Courts there is that section to be considered. The question of the validity of the sale which took place in execution is obviously a matter relating to the execution of the decree. [See *Veyindramuthu Pillai* v. *Maya Nadan* (2), *Nadamuui Narayana Aiyangar* v. *Veerabadra Pillai* (3)].

PANCHU SAHU *v.* SHEIKH MUHAMMAD YAKUB, I L R 7 Pat. 76.

This judgment prefers the view of the Calcutta and Madras High Courts in *Bhola Nath Bhattacharjee* v. *Kanti Chandra Bhattacharjee* (4) and *Ramasami Kone* v. *Sundar Kone* (5) to the view that found favour with the Bombay High Court in *Satwaji Balajirav* v. *Sakhar Lal Atmaram Shet* (6). We agree that the mere confirmation of the decree of the trial court by a court of appeal does not *ipso facto* extend the time fixed by the trial court for the performance of any condition. We invite attention to the discussion of the question in 52 M. L. J., pages 54 and 55 (Journal portion).

GOKHUL PANDE *v.* BALDEO SUKUL, I L R 7 Pat. 90.

The admissibility of the additional evidence tendered in this case turned upon the applicability of S. 32, cl. (5) of the Indian Evidence Act. The learned Judges hold that the evidence was admissible as the Indian Law is wider than the English Law on the point. No doubt the statement as to the existence of the relationship between any two persons, made by a person with special means of knowledge, is admissible not only on that issue but also on other relevant issues. The

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1. (1919) I L R 43 M 351 : 37 M L J 706.
2. (1919) I L R 43 Mad. 107 : I L R 38 M L J 32 (F B).
3. (1910) I L R 34 Mad. 417 : 21 M L J 928.
4. (1898) I L R 25 C 311. 5. (1908) I L R 31 M 28 : 17 M L J 495.
6. (1915) I L R 39 B 175.

illustration (*l*) to S. 32 itself shows that the Indian Law is different from the English Law. See also *Dhanmull* v. *Ram-Chunder Ghose* (1), *Mahomed Syedal Ariffin* v. *Yeoh Ooi Gark* (2). But the objection to the statement in the particular case being admissible was not because it was not relevant on the issue but because it was alleged that the statement was not made *ante litem motam*. The judgment under notice does not meet this argument. The section itself requires that the statement must be made before the question in dispute was raised. No doubt the dispute should relate to the particular subject in issue but it is well established that even if the existence of the controversy is not known to the declarant, the statement is inadmissible. Similarly also the evidence will be inadmissible "even though the former controversy was between different parties or had reference to a different property or claim, if matters to which the statement relates were already under discussion in the former dispute". See Taylor on Evidence, S. 663. See also *Berkeley Peerage case* (3). Applying the rule as stated above to the facts of the particular case, it would appear that the statement would be inadmissible as not having been made *ante litem motam* unless it be that the relationship of the person as spoken to in the previous deposition now sought to be admitted was altogether collateral to the defence in the prior suit with reference to the denial of the alleged reversionship of the plaintiffs therein. In the absence of fuller particulars as regards the exact nature of the respective contentions of the plaintiffs and the defendants in the earlier litigation of 1915, wherein the deposition now sought to be admitted in evidence was given, it cannot be said that the contention of the appellants is wrong. The judgment however throws no light on this matter.

HERBERT FRANCIS *v.* NAWAB SAIYID MUHAMMAD AKBAR, I L R 7 Pat. 99.

A mortgage bond executed out of British India which was sent to British India for registration was lost before the actual registration thereof. In a suit to recover the debt, a copy of the bond was tendered as secondary evidence. As the original bond was unstamped, objection was taken to the reception of secondary evidence on the authority of the Privy Council deci-

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1. (1890) I L R 24 C 265.
2. (1916) L R 43 I A 256 : L R (1916) 2 A C 575 (P C)
3. (1811) 4 Camp. 401.

sion in *Rajah of Bobbili* v. *Inuganti China Sitaramaswami Garu* (1), as the original document was itself not admissible in evidence. This judgment holds that the document having been executed out of British India did not require to be stamped as a bond though if it had been registered as a mortgage bond it would have attracted duty and that S. 35 has no application in consequence. It is not clear why the document does not come under S. 3, cl. (*c*). For the purposes of the Stamp Act, the document must be taken as it reads and the fact of its subsequent non-registration and its invalidity as a mortgage cannot affect the question. When the document was received in British India, it was a document which *ex facie* was a mortgage bond as defined in the Stamp Act and, as it related to immoveable property in British India, the document would attract duty under S. 3, cl. (*c*). It may be a different matter, however, if the document was altered into a mere bond, the clauses relating to the mortgage over immoveable properties being deleted by consent of parties prior to its receipt in British India. In the view that the document attracted stamp duty on its receipt in British India, S. 35 of the Act, which permits the admission of the document on payment of stamp duty and penalty, will not help the plaintiff, as the original deed is not available. Similarly also the terms of S. 36 cannot be relied on, as it must be taken on the principle and reasoning of the Privy Council in *Rajah of Bobbili* v. *Inuganti China Sitaramasami Garu* (1), that it is appilcable only to the admission of the original document in evidence.

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1. (1899) L R 26 I A 262 : I L R 23 M 49 (P C).

TULSHI RAM *v.* BISHNATH PRASAD, I L R 50 All. 1.

It is settled law that when a suit is brought to enforce a debt of the father, the son can escape liability only by showing that it is illegal or immoral and as such not payable by him and that that burden is not discharged by showing generally that the father was a man of immoral or vicious habits. It is also well settled that the father can alienate family property for antecedent debts. One should have thought that it followed as a matter of course from these two positions that when a suit is brought on a mortgage for antecedent debts the burden should lie on the son to show that the debts were immoral or illegal and as such not binding on him. The burden would be on the creditor to prove the existence of the antecedent debt, but when he has shown that, the burden would necessarily be shifted on to the son to show the illegality of the debt. The whole confusion is due to taking certain observations by the Privy Council, where they speak of the property going out of the family and the son impeaching the transaction [*Suraj Bansi* v. *Sheo Prasad* (1)], as excluding the application of the rule as to burden in situations other than those that they speak of. Their Lordships in this case rightly rejected the contention. A similar confusion exists as to sales for antecedent debts. It is imagined because a father may effect a sale for antecedent debts, the power may be exercised without reference to the question whether the extent of the debts justified the exercise of the power and whether the terms secured were reasonable.

The whole trouble comes out of trying to decide questions without reference to principle.

JAIKARAN SINGH *v.* SHEO KUMAR SINGH : I. L. R. 50 All. 36.

To the cases cited as justifying the conclusion arrived at in this case we may add *Sanagapally Lakshmayya* v. *Intoory Bolla Reddy* (2) where the principle was extended to the case of the mortgagee in default purchasing it from the purchaser at revenue sale. The principle on which the decision is put in that case is that the mortgagee cannot be allowed to take advantage of his own default and plead for his own benefit that, by reason of such wrong, there has been a statutory extinction of the mortgage security. In *Deo Nandan Prashad* v. *Janki Singh* (3) their Lordships explain the principle to be "however

1. (1879) L R 6 I A 88 : I L R 5 C. 148, at p. 171 (P C).
2. (1902) I L R 26 M 385.
3. (1916) L R 44 I A 30 : I L R 44 C 573 : 32 M L J 206 (P C).

free from blame the minor (the mortgagee) may have been, he cannot profit by his agent's deliberate default committed in breach of the terms of the mortgage". Their Lordships held that a co-owner, committing default in the payment of revenue, he is bound to pay, and purchasing the property free of the rights of his co-owner, was in the same position. S. 88 of the Trusts Act would seem to apply to these cases.

PARSOTAM SARAN *v.* BARHMA NAND : I L R 50 All. 41 (F. B.).

The question in this case was as to the effect of a sale in execution of a decree taking place in ignorance of the stay order passed by the Appellate Court. The purchaser was a stranger. The Full Bench holds that the sale is good and cannot be set aside. The same view is taken by a Full Bench in Madras in *Venkatachalapati Rao* v. *Kameswaramma* (1). Mr. Justice Mukherjee makes a distinction between the case of a stranger purchaser and a decree-holder purchaser. While in the case of the stranger, he would not be affected by the uncommunicated order, the decree-holder, he holds, would be bound by it and the sale is liable to be set aside on a principle analogous to that governing restitution.

BAIJNATH PRASAD *v.* NARAIN PRASAD, I L R 50 All. 51.

Except in the case of Calcutta and Lahore High Courts, the Courts in India would seem to be agreed that an award on a reference out of court pending suit might be acted on as an adjustment of the suit under O. 23, R. 3, but, those rulings cannot justify dealing with an award on a reference through court pending suit on that footing, ignoring the conditions and limitations laid down in the schedule. Even in the case of an award on a reference out of court treated as an adjustment, objection such as misconduct of the arbitrators is available and if it is vitiated by such misconduct no decree can be passed.

ABDUL SATHAR, *In re* : 54 M. L. J. 456.

The decision in this case is substantially correct. Whether the facts made out an offence under S. 363 or S. 366, Indian Penal Code, was preliminary to the argument that the First class Magistrate had no jurisdiction. The learned Judge, having

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1. (1917) I L R 41 M 151 : 33 M L J 515 (F B).

found that S. 363 applied, there was an end of the question. The second point was whether the offence was not made out because the girl wanted to go away with the accused. It was argued that the consent of the girl avoided the offence. Strictly speaking, this was confusion. The only question was whether there was taking or enticing out of the keeping of the lawful guardian. Where the girl was driven away by the guardian, there was no offence [*Pandyaram* v. *Emperor* (1)], because there was no guardianship. If under any particular set of circumstances it is possible to hold that the girl is effectively out of guardianship, then there can be no taking. *R.* v. *Meadows* (2) which was criticised in *R.* v. *Kipps* (3) was a peculiar case and can be defended on this basis. *R.* v. *Robins* (4) was very near the border-line if you went on the doctrine of consent. In that case, A. went in the night to the house of B., and placed a ladder against the window of the girl down which she came and eloped with A. It was held that the offence was committed. Similarly in *R.* v. *Biswell* (5), where the girl and man quitted the house in consequence of a proposition which emanated from the girl. The substance of the matter seems to have been well laid down by Sanderson, C. J., in *Emperor* v. *Safdar Reza* (6): "One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience". This, we think, is the proper principle and Srinivasa Aiyangar, J., might have put the decision under discussion on this ground.

KONAMMAL *v.* ANNADANA : L R 55 I A 114 : I L R 51 Mad. 189 : 54 M L J 504 (P C).

The judgment of the Privy Council in this case satisfactorily clears the confusion resulting from various contradictory rulings of that tribunal. On the one side, we had *Raja Yarlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yarlagadda Durga Prasada Nayudu* (7), where the Privy Council had ruled that a suit for partition in respect of the partible property of a joint family followed by a decree did not operate as severance in respect of the impartible estate. *Tara Kumari* v. *Chaturbhuj Narayan Singh* (8), on the other hand,

1. (1912) M W N 538.
2. (1844) 1 Car. & Kir 399.
3. (1850) 4 Cox Crl. Cases 167.
4. (1844) 1 Car & Kir 456.
5. (1847) 2 Cox Crl. Cases 279.
6. (1922) I L R 49 C 905.
7. (1900) L R 27 I A 151 : I L R 24 M 147 : 10 M L J 294 (P C).
8. (1915) L R 42 I A 192 : I L R 42 C 1179 : 29 M L J 371 (P C).

laid down that partition in respect of all the partible property of the family operated as a complete severance in respect of the family, the impartible estate being in no sense joint family property. Again we had the various rulings of the Privy Council that a unilateral declaration of an individual member of the family was enough to effect a separation of status in respect of him. How far would these rulings apply to impartible estates? If they did to the full extent, it would have been in the power of the holder of the estate by a declaration of his to put an end to the joint status of the family and effectively cut off all the junior members with nothing. That would have been obviously very unsatisfactory. That there could be a renunciation in advance was held in *Periasami* v. *Periasami* (9) and the possibility of a separation by consent is assumed in *Vadrevu Ranganayakamma* v. *Vadrevu Bulli Ramayya* (10) and *Tara Kumari* v. *Chaturbhuj Narayan Singh* (8). In this case their Lordships explain *Tara Kumari* v. *Chaturbhuj Narayan Singh* (8) as a decision on the facts. that there was a complete separation even in respect of the impartible estate (though the observations in that decision would seem to have a larger operation) and lay down, agreeing with Mr. Justice Ramesam, that "in order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressly or impliedly on behalf of the junior members of the family to give up their chance of succession to the impartible estate". A limitation of the kind suggested would seem to be necessary in the circumstances of the case, but the precise legal basis of the distinction is not indicated. Either, the rule of succession being a customary mode of succession though one indicated by the Mithakshara, the only way of putting an end to the custom is by consensus of the family and short of it, so far as individuals are concerned, by renunciation of their interest in the estate or the rule as to unilateral declaration must be confined to partible property where such a declaration would only mean readjustment of rights by way of partition and cannot be extended to a situation where upholding it would mean the confiscation of the rights of the other members. The texts from which the rule is inferred, it will be seen, refer only to normal cases.

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8. (1915) L R 42 I A 192 : I L R 42 C 1179 : 29 M L J 371 (P C).
9. (1878) L R 5 I A 61 : I L R 1 M 312 (P C).
10. (1879) 5 C L R 439 (P C).

VENKATRAMAN MUKUND v. JANARDHAN BABURAO, I L R 52 Bom. 16.

In this case a number of questions have been discussed though a decision on most of them was unnecessary for the ultimate conclusion. In the course of the judgment the learned Judges have not expressed a decided opinion on the question, whether benefit apart from necessity will support a sale of joint family properties by the manager. On the finding that the alienation in the particular case was not beneficial to the family it was unnecessary for the learned Judges to express any opinion on the question. Still the learned Judges have expressed an inclication to the view that mere benefit apart from necessity will not justify an alienation of joint family properties. It is somewhat strange that at this time of day, the question does not admit of a definite answer one way or the other and they should feel bound to leave it open, especially as the question is one of constant occurrence. The word "necessity" itself when used in connection with alienations by managers of joint families, limited owners or *shebaits* has not to be understood in the sense of actual compulsion but in a somewhat special, almost technical, meaning. It includes the kind of pressure which the law recognises as serious and sufficient, such as the obligatory ceremonies according to Hindu conceptions. For instance, in the case of a Hindu widow, alienation of immovable properties for the payment of the last owner's debts, maintenance of herself and even her own children would be upheld under the head of necessity. See *Ramsumran Prasad* v. *Shyam Kumari* (1). That apart from necessity understood in this wide signification, an alienation can be supported on the ground of benefit has been recognised since at least *Hunoomanpersaud Panday* v. *Musammat Munraj Koonweree* (2). That the Privy Council has not deviated to any extent in *Palaniappa Chetty* v. *Sreenath Devasikamani Pandara Sannadhi* (3) from what they laid down so early, can easily be realised from the fact that they expressly followed it in the later case. There seems, therefore, to be no reason to restrict the principles laid down in the leading case, although the question in each case will be whether the transaction is beneficial or not. The question does not seem to have been fully discussed in the

1. (1922) L R 49 I A 342 : I L R 1 Pat. 741 : 44 M L J 751 (F C).
2. (1856) 6 M I A 393.
3. (1917) L R 44 I A 147 . I L R 40 M 709 : 33 M L J 1 (P C).

case of *Vishnu* v. *Ramchandra* (4) to which reference has been made by the learned Judges. On the other hand, the question has been fully considered with reference to all the important decisions in the recent case of *Jado Singh* v. *Nathu Singh* (5) and the conclusion has been arrived at that benefit even apart from necessity will support an alienation of joint family properties. The decision of the Privy Council in *Palaniappa Chetty* v. *Sreemath Devasikamani Pandara Sannadhi* (3) which is supposed to have laid down the stricter rule has also been considered by the learned Judges of the Allahabad High Court. The same conclusion has been arrived at by the Madras High Court in *Mahalakshmamma* v. *Ramaswami* (6) following earlier decisions commencing from *Krishnasami Doss Reddi, In re* (7). See, however, *Doraiswami Aiyar* v. *Venkatarama Aiyar* (8). The same view has been taken by the Calcutta High Court after a full consideration in *Krishna Chandra Choudhury* v. *Ratan Rani Pal* (9) and *Sm. Ishani Dasi* v. *Ganesh Chandra Rak Shit* (10) and by the Patna High Court in *Ram Bilas Singh* v. *Ramyad Singh* (11). The question is one of frequent occurrence before the subordinate courts and it is not desirable that it should have been left open, and the answer, we venture to submit, is not in doubt having regard to the above decisions which have been given subsequent to the pronouncement of the Privy Council in *Palaniappa Chetty* v. *Sreemath Devasikamani Pandara Sannadhi* (3).

In re HYDERBHAI HUSSENBHAI, I L R 52 Bom. 126.

The point that came up for consideration in this case, whether, under the Presidency Towns Insolvency Act, a creditor can present a petition in insolvency against a debtor at any time when the latter's properties are under attachment or within three months after the cessation of such attachment which has lasted for more than twenty-one days, is one uncovered by authority in this country. The point is a narrow one on the language of S. 9 (*e*) of the Presidency Towns Insolvency Act. This provision was introduced for the first time in the Presidency Towns Insolvency Act of 1909. There is no corresponding provision even in the present Provincial Insolvency Act of 1920, S. 6 (*e*) of the Act; and there was none in the Provincial Insol-

3. (1917) L R 44 I A 147 I L R 40 M 709 : 33 M L J 1 (P C).
4. (1923) 25 Bom. L R 506. 5. (1926) I L R 48 A 592.
6. (1926) 50 M L J 657. 7. (1912) M W N 167.
8. (1920) 13 L W 618. 9. (1915) 20 C W N 645.
10. (1918) 23 C W N 858 11. (1920) 5 Pat L J 622.

vency Act, of 1907. Even in England, there was no similar provision prior to the Bankruptcy Act of 1890. Those provisions only referred to a sale in execution of the debtor's property as constituting an act of insolvency or bankruptcy. It is significant that the language of S. 9 (*e*) of the Presidency Towns Insolvency Act is not identical with the language of S 1 of the English Bankruptcy Act of 1890, which has been re-enacted in the present English Bankruptcy Act. There is therefore some force in the contention that, under S. 9 (*e*) of the Indian Act of 1909, what is required is that there should have been an attachment of the debtor's property for a period of not less than twenty-one days and even one year is such a period and it is therefore one continuous act of insolvency whatever may be the length of the period that the properties are under attachment. It is difficult to see why the Indian Legislature has used language different from that of the English enactment especially when it had received judicial consideration by the Court of Appeal in England, prior to 1909. But once the learned Judges came to the conclusion that the Indian Legislature did not mean anything different by the provisions of S. 9 (*e*) of the Presidency Towns Insolvency Act, the law as expounded by the Court of Appeal ir *In re Beeston* (1) by Vaughan Williams, L. J., on a question of Bankruptcy, law and by Lindley, M. R., following a prior decision in *In re Hurley* (2), directly applies and the act of insolvency is complete after twenty-one days of the attachment and unless the creditor's petition is presented within three months therefrom, it is not an available act of insolvency.

HARI LAXMAN *v.* THE SECRETARY OF STATE FOR INDIA, I L R 52 Bom. 142.

The principles acted upon in this case are strictly in accordance with the decisions in England regarding the effect of the impossibility of performance under a contract, although it may well be doubted whether S. 56 of the Indian Contract Act, enacts exactly the English rule on the subject for this country. It may be remarked that even in England, at the time of the enactment of the Indian Contract Act, the principles on this branch of the law were not clearly appreciated and one may almost say that they are still in the making and have only been expounded in the cases that arose out of the late war and its effect on contractual rela-

1. L R (1899) 1 Q B 626. 2. (1893) 10 Mor. 120.

tions. That the pronouncements on the question in England have not always been uniform or consistent is clear from their examination by Lord Sumner in *Bank Line, Ltd.* v. *Arthur Capel & Co.* (1). Still if the term impossibility in S. 56 is understood in the sense of physical or legal impossibility as laid down in the Indian decisions, see *Ezekiel Abraham* v. *Ramjusroy* (2), *Karl Ettlinger* v. *Chagandas & Co.* (3) and *Gowri Sankar Agarwalla* v. *H. P. Maitra* (4), it is not difficult to harmonise the law as enacted by the section with the recent English decisions. The theory of "implied term", as it is some times called, with regard to future impossibility of performance can easily be brought under the category of implied agreement under the Indian Law as also under S. 56. It may be a question whether a strike of workmen rendering the performance of a contract impossible in the sense understood by the Indian decisions will not avoid a contract altogether, if it was unforeseen. It would seem in England that if a person makes a contract absolute in terms it would not be affected by the subsequent impossibility of its performance. It may be a question whether on the language of S. 56, the same results will follow.

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1. L R (1919) A C 435.
2. (1920) 33 C L J 151
3. (1915) I L R 40 B 301.
4. (1921) 26 C W N 573.

NALLAPERUMAL *v.* SAKUL HAMED, 54 M L J 721.

The applicability of S. 47, Civil Procedure Code, to cases where parties are exonerated has been discussed often. *Sivasamba Aiyar* v. *Kuppan Samban* (1) decided that one who claimed paramount title in a mortgage suit and who was subsequently exonerated from it was bound by S. 47, Civil Procedure Code. But *Krishnappa* v. *Periyaswami* (2) made a distinction and held that where the exoneration was due to misjoinder the party did not remain one for the purposes of S. 47. When *Sannamma* v. *Radhabayi* (3) was before the Division Bench, the learned Judges entertained doubts as to the soundness of *Krishnappa* v. *Periyaswami* (2) and referred the matter to the Full Bench. Wallis, C. J., in the leading judgment without deciding whether *Krishnappa's case* (2) was rightly decided had no doubt about the applicability of the section to a case where a party had been properly impleaded as a defendant and the case would have proceeded to judgment but for the fact that the plaintiff elected to abandon his case in part and the suit was consequently dismissed against such defendant. *Sethu Konar* v. *Ramaswami* (4) and *Linga Aiyar* v. *Lakshmana Chettiar* (5) both held that the section would be applicable in such cases. But in the former of these Spencer, J., introduced a circumstance of distinction, *i.e.*, that if, as a consequence of the exoneration, the name of the party is removed from the record, S. 47 will not apply. The observation of the learned Judge was not necessary to the decision of the case, because in that particular case the name of the party was on the record. But in *Linga Aiyar* v. *Lakshmana Chettiar* (5) where the former order of the Munsif was as follows:—"By consent, I strike off the 2nd defendant's name. Plaintiff will pay half his costs", a suit filed by the 2nd defendant was held barred by S. 47. This was the state of the case-law when *Nallaperumal* v. *Sakul Hamed* came up for decision. Srinivasa Aiyangar, J., deliberately refrains from considering the question of parties and it appears from his judgment that the appellant's vakil was not permitted to argue the question whether the plaintiff was a party to the original suit. But Anantakrishna Aiyar, J., founds himself just on the circumstance that the plaintiff's name was removed from the record. No refer-

1. (1915) 29 M L J 629. 2. (1916) I L R 40 M 964 : 32 M L J 532
3. (1917) I L R 41 M 418 : 34 M L J 17 (F B).
4. (1925) I L R 49 M 494 : 50 M L J 205. 5. (1925) 50 M L J 387.

ence is made to the previous decisions or to *Venkatapathi* v. *Subbaraya* (1), where it was laid down that the mere fact that the name of the exonerated party was not formally removed from the record pursuant to the order exonerating him would not affect the question as to whether he remained a party. It would have been more satisfactory if the learned Judges had considered the cases already decided. If ever the question comes up for consideration again, it is to be greatly feared that *Nallaperumal* v. *Sakul Hamed* may not be particularly helpful.

V. P. R. V. CHOCKALINGAM CHETTY *v.* SEETHAI ACHI, L R 55 I A 7 : I L R 6 Rang. 29 : 54 M L J 88 (P C).

The addition of party respondents in appeals of persons who, though parties to the original suit, have not been impleaded as respondents when the appeal was first filed is now regulated by O. 41, R. 20, Civil Procedure Code. The High Courts had taken conflicting views on the meaning of the corresponding S. 559 of the old Code. Vide *Subramaniam Chetty* v. *Veerabadran Chetty* (1-a), *Atmaram* v. *Balakrishnan* (2) on the one hand and *Upendra Lal* v. *Grindora Nath* (3) and *Rup Jaun Bibee* v. *Abdul Kadir* (4) on the other. This judgment of the Privy Council delivered by Sir John Wallis affirms the decision of the court below reported in 2 Rang. 541 which specifically follows the Madras view and dissents from the contrary view of the Calcutta Courts. It may be noted that the decision in *Subramaniam Chetty* v. *Veerabadran Chetty* (1) was that of a bench of which Justice Wallis was a member. Notwithstanding the fact that the new Code of 1908 has now a new rule, O. 41, rule 33, giving wider powers to appellate courts, the Privy Council has chosen to take the restrictive interpretation of O. 41, rule 20, which found favour with the Madras High Court. A party who has got a decree in his favour against whom an appeal has not been preferred within the time allowed by the law of limitation is not "a person interested in the result of the appeal" that may have been filed against other persons. It must now be taken that the proposed party respondent must be shown to have some interest in the result of the pending appeal before he is brought on record

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(1) (1907) 17 M L J 416.

(1-a) (1908) I L R 31 M 442 : 18 M L J 452.

2. (1883) I L R 5 All. 267. 3. (1898) I L R 25 C 565.

4. (1904) I L R 31 C 643 (F B).

and the interest he may acquire as a result of being added as respondent will not suffice. So interpreted, the powers of the appellate court are greatly curtailed and it is apparent that the rule will have very limited scope for its operation. Even in the decision in *Subramanian Chetty* v. *Veerabadran Chetty* (1), the difficulties and hardship involved in such a narrow construction were pointed out by the learned Judges. The insertion of a new rule in O. 41, rule 33 seems to indicate that the Legislature intended to give wider powers to the appellate court and it would have been in consonance with the intention of the Legislature to interpret O. 41, rule 20 liberally. The Madras High Court itself had in later cases taken a different view, vide *Ponnuswami Asari* v. *Palaniandi Mudali* (5). It is doubtful whether it can now be taken that O. 41, rule 20 is not exhaustive of the powers of the appellate court to add party respondents and whether any reliance can be placed on O. 1, rule 10 and S. 107 to justify wider powers.

The scope of O. 41, rule 33 has been considered by the Privy Council in an earlier case *Mahomed Khaleel Shirazi* v. *Les Tanneries Lyonnaises* (6) and the tendency of their Lordships' observation is towards taking a restrictive view of the scope of the section. In the present decision also their Lordships are not inclined to extend the scope of O. 41, rule 33 and they leave open the question if a decree can be passed for or against parties not parties to the appeal.

As regards the other point dealt with in the judgment, it must be borne in mind that the decree of the Trial Court declared the sale deed to be perfectly valid as between the plaintiff and the 1st defendant. It is only because this portion of the decree had become final as between the parties that the appeal court had to dismiss the appeals as it was not permissible to go behind that declaration for the purpose of the appeal and no basis of relief other than an attack on this declaration was urged by the appellants as entitling them to get the decree reversed. The decision will not necessarily be applicable to cases where in the first instance the plaint asks for possession only from the defendants and prays for no relief by way of declaration as to the *benami* character of the various sales and the decree also is silent on the question. In such cases even if the original purchasers were formal parties to the suit in the trial court it may

1. (1908) I L R 31 M 442 . 18 M L J 452.
5. (1919) 11 L W 602.
6. (1926) I L R 49 M 435 : 51 M L J 570 (P C).

not be necessary to add them as party respondents in the appeal and it may be sufficient to appeal against the party in possession of the properties sought to be recovered. This decision of the Privy Council does not suggest that every purchaser in the chain of title should necessarily be parties to the suit and appeal.

Lastly the observations of their Lordships as regards the duties of the Official Receiver should not be understood as a pronouncement that the sale by the Official Receiver was invalid under S. 6 of the Transfer of Property Act. What was sold by the Official Receiver was not a mere right to sue but the interests of the insolvent in the actual properties, though such interests were unsubstantial and shadowy. The point of their Lordships' observation was merely that the Official Receiver must investigate the nature of the alleged rights and was not bound to sell shadowy claims for what they were worth and thus promote frivolous litigation.

U MIN DIN *v.* PO THAUNG, I L R 6 Rang. 60 (F. B.).

This Full Bench decision of the Rangoon High Court holds that a suit for mesne profits (whether the profits sought to be recovered were those actually received by the defendant or what he ought to have received with due diligence) is not cognizable by the Provincial Small Cause Courts as such a suit is exempted from their jurisdiction under Art. 31 of the Act IX of 1887. This is in accordance with the view of the Madras and Allahabad High Courts, see *Savarimuthu* v. *Aithurusu Rowthar* (1) though the Calcutta Court had taken a contrary view in *Kunjo Behari Singh* v. *Madhub Chundra Ghose* (2). All the arguments for and against are marshalled in this Full Bench judgment. We agree that the sounder view is the one adopted by this decision and the Madras High Court. It is however necessary to add that this class of suits must be distinguished from the type of suits as in *Annamalai* v. *Subramanyan* (3) where a plaintiff in possession seeks to recover damages from the defendant by way of compensation for a single act of trespass by the defendant.

[END OF VOL. LIV.]

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1. (1901) I L R 25 M 103 : 11 M L J 428 (F B).
2. (1896) I L R 23 C 884 (F B).
3. (1892) I L R 15 M 298 : 2 M L J.15.